

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FLO & EDDIE, INC., individually and on behalf  
of all others similarly situated,

Plaintiff,

-against-

SIRIUS XM RADIO, INC., and DOES 1  
through 10,

Defendant.

CIVIL ACTION No. 13-CV-5784 (CM)

**SIRIUS XM'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION OR,  
IN THE ALTERNATIVE, TO CERTIFY ORDER FOR INTERLOCUTORY APPEAL**

PLEASE TAKE NOTICE that pursuant to Local Rule 6.3, Federal Rule of Civil Procedure 54(b), and 28 U.S.C. Section 1292(b), defendant Sirius XM Radio, Inc. ("Sirius XM"), through its undersigned counsel, hereby moves for reconsideration of this Court's November 14, 2014 Order Denying Defendant's Motion for Summary Judgment ("Order"), or in the alternative, to certify the Order for interlocutory review. The Motion is based on the accompanying Memorandum of Law and Declaration of Marc J. Pensabene, all exhibits, files, and records on file in this action, matters of which judicial notice may be taken, and such additional submissions and argument as may be presented at or before the hearing on this Motion. This Motion is made on the following grounds:

1. The Court's ruling that New York common law provides a public performance right in pre-1972 sound recordings was made without the benefit of briefing or argument on *RCA Mfg. Co. v. Whiteman*, 114 F.2d 86 (2d Cir. 1940). *Whiteman* addressed the same question

presented by Sirius XM’s Motion for Summary Judgment and held that a sound recording owner has no public performance right under New York common law. This warrants reconsideration under the Court’s inherent authority and Federal Rule of Civil Procedure 54(b).

2. The Court’s ruling that it would not violate the Commerce Clause to apply a New York performance right in pre-1972 sound recordings to Sirius XM’s national broadcasts overlooked controlling authorities, including (a) *American Booksellers Foundation v. Dean*, 342 F.3d 96, 103-04 (2d Cir. 2003), which held that it would violate the Commerce Clause *per se* to apply a state law of general applicability to commercial activities that, like Sirius XM’s satellite radio broadcasting and internet streaming, “do[] not recognize geographic boundaries,” and (b) *Flood v. Kuhn*, 407 U.S. 258, 284-85 (1972), which held that it would violate the Commerce Clause to apply conflicting state laws to an entity that, like Sirius XM, is required to follow a nationally “uniform” set of rules. The Court also failed to address the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which is an independent basis for finding a Commerce Clause violation on an “as applied” basis. The Court’s failure to consider these authorities warrants reconsideration under the Court’s inherent authority and Federal Rule of Civil Procedure 54(b). Reconsideration is also warranted under Local Rule 6.3 due to the Court’s failure to consider the controlling authorities cited in Sirius XM’s Motion for Summary Judgment. *See* Dkt. 54 at 35-37.

3. In the alternative, certification for interlocutory review is warranted under 28 U.S.C. Section 1292(b) because (a) the Court’s Order involves a controlling question of law—*i.e.*, whether the owner of a pre-1972 sound recording has a public performance right under New York common law; (b) there is substantial ground for a difference of opinion, as the Court itself recognized, *see* Order at 16, 22 n.4; and (c) an immediate appeal will materially advance the

resolution of this case, as well as similar cases plaintiff has filed against Sirius XM in California and Florida.

Dated: December 1, 2014

Respectfully submitted,

/s/ Marc J. Pensabene

---

Marc J. Pensabene  
mpensabene@omm.com  
O'Melveny & Myers LLP  
7 Times Square  
New York, New York 10036  
Tel: (212) 326-2000  
Fax: (212) 326-2061

Daniel M. Petrocelli (*pro hac vice*)  
dpetrocelli@omm.com  
Robert M. Schwartz (*pro hac vice*)  
rschwartz@omm.com  
Victor H. Jih (*pro hac vice*)  
vjih@omm.com  
O'Melveny & Myers LLP  
1999 Avenue of the Stars  
Los Angeles, California 90067-6035  
Tel: (310) 553-6700  
Fax: (310) 246-6779

*Attorneys for Defendant Sirius XM Radio, Inc.*